

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,

Plaintiff,

Criminal Action
No. 19-cr-10117-IT

v.

September 10, 2019

GREGORY ABBOTT, MARCIA ABBOTT,
JANE BUCKINGHAM, GORDON CAPLAN,
ROBERT FLAXMAN, FELICITY HUFFMAN,
AGUSTIN FRANCISCO HUNEEUS,
MARJORIE KLAPPER, PETER JAN
SARTORIO, STEPHEN SEMPREVIVO,
and DEVIN SLOANE,

Pages 1 to 38

Defendants.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE INDIRA TALWANI
UNITED STATES DISTRICT COURT
JOHN J. MOAKLEY U.S. COURTHOUSE
ONE COURTHOUSE WAY
BOSTON, MASSACHUSETTS 02210

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P R O C E E D I N G S

THE CLERK: Good afternoon. This is Gail Marchione. Who is on the line, please?

MR. McDOUGALL: Jonathan McDougall on behalf of Marjorie Klapper.

THE CLERK: Thank you. Who else?

MR. FRANKEL: This is Steve Frankel at the U.S. Attorney's Office. I'm just listening in.

THE CLERK: Gentlemen, you are own an open mic in an open and very filled courtroom. If you speak we're going to be able to hear you because I'm unable to mute you because this proceeding is being live-streamed into another courtroom.

Until we have Mr. Sternberg on the line, we will wait a minute and then I'll call the case and read the names of counsel into the record. Is that very clear.

I think what we'll do, counsel, instead of waiting for Mr. Sternberg to join us, I will ask you to please stand and identify yourself and who you represent. Counsel on the telephone --

MR. STERNBERG: This is Jeremy Sternberg. I am on the line.

THE CLERK: I'm so grateful. If after you speak your name to be counted on the record as being in attendance, could you please mute your telephones unless the Judge

1 addresses you and asks you to speak. Okay?

2 MR. STERNBERG: Yes.

3 THE CLERK: I'm going to call the case for the
4 record. This is case number 19-cr-10117, United States v.
5 Gregory Abbott, Marcia Abbott, Jane Buckingham, Gordon
6 Caplan, Robert Flaxman, Felicity Huffman, Agustin Francisco
7 Huneeus, Marjorie Klapper, Peter Jan Sartorio, Stephen
8 Semprevivo and Devin Sloane.

9 Will counsel please state their names for the
10 record.

11 MR. ROSEN: Good afternoon, Your Honor. Eric Rosen
12 and Justin O'Connell for the government. Sorry. Gail.

13 MR. STEIN: Good afternoon. Daniel Stein for
14 Gregory Abbott.

15 MS. ONYSHKO: Good afternoon. Katherine Onyshko
16 for Marcia Abbott.

17 THE CLERK: Thank you.

18 MR. SAVAGE: Good afternoon. Joe Savage, Michael
19 Proctor and Yvonne Chan for Jane Buckingham.

20 THE CLERK: Thank you.

21 MR. LEVY: Good afternoon. Joshua Levy and
22 Christopher Walsh for Gordon Caplan.

23 THE CLERK: Thank you.

24 MR. WEINREB: Good afternoon. William Weinreb and
25 Michael Packard for Robert Flaxman.

1 THE CLERK: Thank you.

2 MR. MURPHY: Good afternoon. Martin Murphy
3 for Felicity Huffman.

4 THE CLERK: Thank you.

5 MR. CANALE: Good afternoon. John Canale for
6 Agustin Francisco Huneeus.

7 THE CLERK: Thank you.

8 MR. McDOUGALL: Jonathan McDougall and Daniel Gelb
9 on behalf of Marjorie Klapper.

10 THE CLERK: Thank you.

11 MR. LEVITT: Good afternoon. Peter Levitt for
12 Peter Sartori.

13 MR. BOOZANG: Steven Boozang for Mr. Semprevivo.

14 MR. KENNER: Counsel David Kenner for
15 Mr. Semprevivo.

16 MR. ENTIN: Alvin Entin also on behalf of
17 Mr. Semprevivo.

18 THE CLERK: I'm sorry. You are Mr. Alvin Entin?

19 MR. ENTIN: Yes.

20 THE CLERK: Thank you.

21 MR. HOCHMAN: Nathan Hochman and John Pappalardo on
22 behalf of Devin Sloane.

23 THE CLERK: Also on the telephone we have one more.

24 MR. STERNBERG: Jeremy Sternberg also on behalf of
25 Agustin Francisco Huneeus.

1 THE CLERK: Thank you very much. I am going to
2 call the Judge and have her come down. Until then we can
3 talk amongst ourselves. Thank you.

4 (The Honorable Indira Talwani enters.)

5 THE CLERK: All rise. You may be seated. United
6 States District Court is now in session. The Honorable Judge
7 Indira Talwani presiding. This is case number 19-cr-10117,
8 United States versus Abbott, et al. Counsel have previously
9 identified themselves for the record.

10 THE COURT: Good afternoon.

11 ALL COUNSEL: Good afternoon, Your Honor.

12 THE COURT: So let me just start with a few
13 logistics. This hearing is really designed to address
14 questions of law only. For that reason the individual
15 defendants were permitted to appear through counsel and not
16 required to be present.

17 When you speak, please come to the podium. And for
18 defense counsel, I guess for everyone it would be easier for
19 the court reporter, but for defense counsel, please identify
20 not just your name but also your client.

21 Please don't feel that everyone is obligated to
22 speak. I will not hold it against anyone if you make the
23 decision that what you were going to say has already been
24 said by someone. Okay?

25 So let me just explain for a few minutes briefly

1 why we're having this hearing and what I hope to have people
2 have an opportunity to speak on. And in order to do that, I
3 just want to briefly talk about the sentencing process. I'll
4 then talk about why we're proceeding this way in this case
5 and what we're covering today.

6 So as all the attorneys in the room know, since
7 *United States v. Booker* in 2005, the guidelines developed by
8 the United States Sentencing Commission are no longer
9 considered mandatory, but they are advisory. I am required
10 to consider the range set by the sentencing commission. I
11 may then tailor the sentence in light of sentencing factors
12 set forth under the statute, but I must consider in doing
13 that the applicable category of offense committed by the
14 applicable category of the defendant under the guidelines.

15 And so today what we're talking about is an
16 applicable category of offense under the guidelines. I am
17 not looking today to determine what the right sentence is for
18 any individual defendant. I am also not looking, if the
19 upshot of today is that a particular guideline doesn't apply,
20 that doesn't mean at sentencing you can't argue by reference
21 that that gives us useful information.

22 What I am trying to figure out today, because I am
23 required to make that determination as part of my duty here,
24 is I am trying to find out what the guidelines themselves set
25 as the appropriate sentence or way of figuring out the

1 sentence. Obviously there are 12 different defendants, and
2 there will be different, potentially different, guidelines
3 for the different defendants. But I am trying to address the
4 legal concept here under the guideline scheme.

5 Under 18 U.S.C. 3553, if there is no applicable
6 guideline or if there's an aggravating or mitigating
7 circumstance that's not adequately taken into consideration
8 by the guidelines, I'm allowed to consider how the sentence
9 compares -- how this crime compares to other things
10 considered in the guidelines and so forth. All of that is
11 really not for today. Today I'm just trying to figure out
12 what the applicable category offense is here.

13 So part of the way that I will normally do this and
14 that I'm required to do this is that the probation office
15 prepares a presentence report for me. And that again there's
16 directions in the statutes and the rules of how that should
17 happen. The probation officer works for the courts. She,
18 the office, is not an adjunct of either side but is here to
19 assist the Court by gathering information from the
20 government, from the defendant, from collateral sources, and
21 preparing the presentence report for me.

22 Under Rule 32(d), the presentence report is
23 required to figure out what the applicable sentencing
24 guidelines should be, and the presentence report is required
25 to identify the applicable guidelines, calculate the offense

1 level and criminal history category and state the resulting
2 sentencing range and identify any factors under the
3 guidelines that I should be considering.

4 So under the rules a draft of the presentence
5 report goes to the defendants and the government. And the
6 way it happens in practice is that goes there without coming
7 to me. So in this case all of the parties and the government
8 got copies of draft presentence reports or will be. I guess
9 at this point all the drafts have gone out. And there's an
10 opportunity to file an objection, file objections.

11 And once those objections are there under the
12 rules, the probation officer is required to consider those
13 objections. She may meet with the parties, talk about it
14 with them, investigate further. But then she's obligated to
15 convey in the final presentence report her resolution of
16 those objections in her view. And that gets prepared into a
17 final presentence report.

18 So in the sentencing process, that's the first time
19 I see the material. It's the first time I see the victim
20 impact statements. It's the first time -- and I don't see
21 any material at that point other than the final report which
22 includes objections and the probation officer's response to
23 it and the victim impact statements and any other material
24 that the probation officer has reviewed that is available if
25 I request it or need it. But that's not part of the

1 customary process.

2 The rules here also allow the probation officer to
3 make a specific sentencing recommendation. This part isn't
4 the guideline calculation. This is the what should a judge
5 do at the end of the day. And the rules allow that that can
6 be made confidentially; that the Court may direct the
7 probation officer not to disclose that confidential
8 recommendation.

9 The First Circuit has explained that the reason
10 that the court may have these kind of ex parte communications
11 with the probation officer is that those communications are,
12 in the First Circuit's words, "fundamentally different from
13 communications with third parties as the probation officer is
14 an extension of the court itself and functions as an arm of
15 the Court." And so a court has the right to confer ex parte
16 with the probation officer for advice or analysis.

17 There are, however, other rights that could be and
18 should be considered. And in particular the courts have
19 noted the due process rights of defendants. But the final
20 rule is that the judges and the probation officers are
21 permitted to discuss sentencing, but the probation officer
22 may not relay any facts that are not known to either side
23 without it being disclosed to the party and giving them an
24 opportunity to respond. That's a basic due process
25 requirement.

1 So I have made it my practice, after realizing that
2 people wouldn't know that that had happened unless someone
3 announced it, I've started making it my practice that if --
4 that I alert people that it's my usual practice to meet with
5 the probation officer, and if there's an objection to not do
6 so.

7 And the reason is I don't want people to be nervous
8 or concerned that there are facts being conveyed to me that
9 aren't known. That certainly has not happened in this case.
10 The government objected to my having any conversations with
11 the probation officer, any further conversations in this
12 matter. And I understood the reason for that is that we want
13 to -- this is a case with a lot of attention on it, and it's
14 important that the public understand what is going on.

15 So the purpose of this hearing is really to flesh
16 out those legal issues. I am not going to put the probation
17 officer on the spot to have her have to verbally present her
18 findings. But I am going to suggest, unless there is any
19 objection from any party, which I'd be happy to consider, but
20 I am going to suggest that the portion of the presentence
21 report and I think the final -- I now have three final ones
22 -- and perhaps the last of the three that I've received,
23 which was the presentence report in Ms. Huffman's case, that
24 the probation officer's response to government's objection
25 one be made public. And I'm just looking for that legal

1 argument so we have the legal arguments fully there. I don't
2 think there's anything in there that's confidential. There
3 is reference to the identity of victims, but I think that's
4 all publicly disclosed in the government's brief.

5 Unless there's any objection, when this proceeding
6 is done, I am going to ask the probation officer to file --
7 to docket that portion of the presentence report.

8 MR. ROSEN: No objection, Your Honor.

9 THE COURT: And also I think some of the defendants
10 have not yet received final presentence reports. So then
11 they'll have the same information. So that's how we got
12 here. I think what we need to now do is turn to the task at
13 hand, which is to determine the appropriate application of
14 the guidelines.

15 I'm happy to have the government start in. As you
16 know from some of my other hearings, I sometimes tend to go
17 back and forth with parties, but let's start here with the
18 government.

19 MR. ROSEN: Where would you like me to address the
20 Court, from here or the podium?

21 THE COURT: You're actually fine right there.
22 We'll make defense counsel move around, but you're fine
23 there.

24 MR. ROSEN: I'd like to first, Judge, thank
25 probation and the probation officers for the absolutely

1 tremendous work they've put in for this case and for really
2 every other case I've worked with them on. I've worked with
3 Ms. Victoria, especially, over the years in this case and
4 also a couple of others that we deal with in the securities
5 fraud realm, and her work is exemplary.

6 I don't know of a single harder worker than she.
7 It's great that she's assigned to this case. I realize some
8 sharp elbows have been thrown throughout the recent
9 proceedings, but I just want her to know and the probation
10 officers to know that at least myself, and I think I speak
11 for the rest of my colleagues, truly appreciate the hard work
12 that they've put in here. We come in peace to the hearing,
13 Your Honor, and I want to make sure that the Court
14 understands that.

15 THE COURT: I want to thank you for that
16 acknowledgment. And I do want to just suggest that part of
17 my thinking in putting the probation officer's response in is
18 it's a very considered response. No matter how I end up at
19 the end of this hearing, I think it's important for everyone
20 to understand is what we're trying to figure out here is a
21 legal question.

22 MR. ROSEN: Absolutely.

23 THE COURT: Thank you.

24 MR. ROSEN: Judge, the government respectfully
25 submits that the only issue this Court really can decide or

1 should decide is whether the victims here, the five victims
2 mentioned, suffered even a single penny of loss. Because if
3 you so find, and consistent with the evidence and submissions
4 by the government and the victims, that the specific amount
5 cannot reasonably be determined under the guidelines, then we
6 must use gain from the offense.

7 THE COURT: I'm going to back you up a little bit
8 slower here. Start me out with what section of the
9 sentencing guidelines you think we should be looking at.

10 MR. ROSEN: Judge, the government together with
11 defense counsel have applied 2B1.1 here, and we're fully
12 prepared to proceed under that guideline.

13 THE COURT: Let's just go slowly because I'm
14 working here on needing to assure myself that whatever we're
15 doing is the right guideline regardless of the parties'
16 agreement. So I don't disagree with you that the right
17 guideline is 2B1.1, but I do want to make sure of how we get
18 there because I don't think it's merely by agreement of the
19 parties.

20 MR. ROSEN: I think that, well, a couple different
21 things. Obviously we get there first through the appendix
22 and the parties here have pled guilty to mail fraud and
23 conspiracy -- conspiracy to commit mail fraud as well as
24 conspiracy to commit honest services mail fraud. 1341, I
25 believe, is in the appendix and it goes back to 2B1.1.

1 1346 is not in the appendix. Hence numerous courts
2 have looked at that and have applied the commercial bribery
3 guideline under 2B1.1.

4 THE COURT: Let me just stop you there. Here's how
5 I'm going through it. See if you disagree with me. I start
6 out under 1B1.1, and 1B1.1 tells me that the first thing I
7 need to do is to go look at the appendix. Sorry. 1B1.2
8 tells me to go and look at the appendix. And when I get to
9 the appendix, as you said, I get 1341 there. And 1346 is
10 merely a statute that says a term in 1341 can include honest
11 services as part of that fraud. So I'm looking there, and
12 I'm thinking, okay, so that's why we go with the guideline
13 for 1341. And that gets me to 2B1.1.

14 You may have had the argument in your brief that it
15 would be appropriate to use the commercial bribery statute.
16 And I just want to make sure because, again, I am supposed to
17 be making this determination, not merely on agreement.

18 MR. ROSEN: Judge, I think the point of our brief
19 is not to say we should use the commercial bribery statute,
20 but simply to say that the proper method of calculating the
21 case here, and we call it the stipulated gain/loss as
22 appropriate and reasonable, can be looked at based on other
23 guidelines.

24 THE COURT: And I guess my point is that that is
25 absolutely an argument that's made in sentencing that I could

1 look at that. And that it's, in fact, if I don't have a good
2 guideline that works, it would be a way to look at it, and
3 I'm required to do it under the statute. But I first want to
4 find what's the right guideline.

5 MR. ROSEN: Sure.

6 THE COURT: And you make the argument that 2B4.1
7 has been used by other courts. So I went through all of
8 those. That's your footnote 25 in your brief.

9 MR. ROSEN: Correct.

10 THE COURT: All of them except for one predate
11 changes to the guidelines that are relevant here. They're
12 all old guidelines. So, for example, the oldest ones are
13 from when you weren't required to go to the appendix and find
14 the one that's there. You were allowed to look at what
15 guideline was most appropriate. And the 2B1.1 isn't even
16 referenced in the guideline until I think 2004 or 2005. And
17 the only one that references 2B4.1 as the guideline for 18
18 U.S.C. 1331 is the *United States v. Kelly*, a May 2018
19 decision, but it's just a sentence. There's no analysis.
20 It's another district judge who simply says look at it.

21 So what that means is -- I assume you did a fairly
22 diligent search. My takeaway from that is I think we're
23 stuck with 2B1.1 for better or for worse and not 2B4.1.

24 MR. ROSEN: Your Honor, I would point the Court
25 also to it -- we're going forward on the 2B1.1 pursuant to

1 the plea agreement. There's no dispute about that. I think
2 the Court in *Jerome Allen*, it's a related case to this case
3 in the Southern District of Florida, used the underlying
4 offense as 2B4.1, commercial bribery, to calculate the money
5 laundering guideline.

6 THE COURT: But we don't have the money laundering
7 charge here.

8 MR. ROSEN: But money laundering you look at the
9 calculation based on the underlying offense.

10 THE COURT: The guidelines, as I read them, require
11 me to look up the statute that they're charged with and then
12 look up the part of the guideline that works. If it doesn't
13 help us here, I am not in any way stopping you from making
14 arguments in this or any other case that that would be the
15 right thing to look at because we don't have a good number.

16 But what I'm trying to find today is what guideline
17 am I supposed to look at. And when I read the 2B1B1.2, it
18 doesn't say find the most promising guideline, which it used
19 to say in the '80s, that's what it said. It doesn't say that
20 anymore. It says find the guideline that we've listed in the
21 appendix.

22 MR. ROSEN: Right. Well, a couple of things. The
23 money laundering guidelines simply ask you to look at the
24 base offense level for the underlying crime. So it's the
25 same issue. It's the same issue. They use 2B4.1. And I

1 really think, Judge, we're making a distinction here between
2 2B4.1 and 2B1.1, but the difference is extremely narrow.
3 It's a one point difference. One takes a look at the amount
4 of bribe paid, and the other takes a look at the loss or, if
5 you cannot reasonably determine it, the gain, which in this
6 case is also the bribe paid.

7 So either way we're arriving at the same conclusion
8 which is that you enhance the base offense level by the
9 amount of the bribe paid.

10 THE COURT: And I'm not disagreeing with you that
11 that might be where we are at step two. All I'm asking you
12 is that for today what I'm trying to focus on because --
13 maybe I'm off base here, but it is my understanding of my job
14 here is to first make a correct determination of the
15 guidelines.

16 MR. ROSEN: Right.

17 THE COURT: Not a "this is analogous
18 determination." That I should look at also, but that I do at
19 step two.

20 MR. ROSEN: Judge, the government is obligated to
21 hold the plea agreement up, and we're doing that here under
22 2B1.1. They're obviously very similar guidelines, and they
23 take into account very similar losses. But in terms of
24 today's proceeding, we ask you to apply 2B1.1. You can look
25 at cross references and things like that, you can look at

1 analogous situations, but I also note that we have filed plea
2 agreements in this case that use correctly 2B4.1, Jeff
3 Bizzack, who is before Judge Woodlock, and Ali Khosroshahin,
4 who is also before Your Honor in the RICO case, the
5 underlying offenses for that.

6 So there is a 2B4.1 angle here. We're trying to
7 get this correct, but we're also trying to uphold the plea
8 agreement which we entered into and which we absolutely
9 intend to uphold during this proceeding.

10 What I want to do is dispel the notion that there's
11 this huge gulf between 2.1.1 and 2.4.1.

12 THE COURT: I agree with you. The difference
13 between what the result would be is very small. I'm not
14 having -- so this may be all semantics that make very little
15 difference. In fact, for some of the defendants here, it
16 makes zero difference, and perhaps none of this conversation
17 makes much difference for some of the defendants. I'm just
18 trying to start in on the sentencings. We have 12 of them
19 over the next month and a half, and I want to make sure I
20 have the guidelines correct.

21 So we're working under 2B1.1. That seems to me to
22 be the correct guideline to be working under. So let's
23 proceed to the next step.

24 MR. ROSEN: Continue on?

25 THE COURT: Yes.

1 MR. ROSEN: Okay. With respect to the findings in
2 the PSR, I can see if the case involved one defendant or
3 maybe a simple isolated bribe or fraud that the PSR could
4 reach a conclusion that there was no monetary loss here. But
5 I think we have to look at in the context of the case as set
6 forth in the PSR, the charging documents, the criminal
7 complaint.

8 This was a massive nationwide fraud case fueled
9 through bribery, fraud, and corruption involving more than 50
10 people, numerous victims, causing demonstrable losses that
11 have played out nightly on the news.

12 Many coaches and administrators were involved and
13 were fired because of their involvement and abuse of their
14 position. Students who got in through fraud and bribery have
15 been investigated to determine their involvement in the
16 scheme internally within the universities. Universities have
17 been forced to revamp administrative and athletics policies
18 as a direct result of this case.

19 Universities have been sued both by people who did
20 not get into the schools and even by one of the defendants
21 here after he pled guilty. And the SAT and ACT organizations
22 were particularly victimized.

23 Rick Singer and his co-conspirators took over and
24 corrupted an entire testing site in Los Angeles. Nearly two
25 dozen scores obtained by fraud have been and continue to be

1 investigated. And the agencies, too, have been forced to
2 beef up their security procedures.

3 All of these events that I talk about cost money,
4 money that came out of the victims' pockets, whether as
5 salary, internal investigation costs or expected future
6 damages. These costs were expensive, and above all these
7 costs were reasonably foreseeable to the defendants who have
8 stipulated as much in their plea agreements.

9 THE COURT: So let's break that down into parts.

10 MR. ROSEN: Sure.

11 THE COURT: I think 9 out of the 12 defendants in
12 this case are involved in having individual tests corrected
13 or someone sat for the exam. So 9 out of the 12 involve test
14 taking pieces. As to those, I don't think we have any
15 allegations that any of these parents new of the other
16 parents, do we?

17 MR. ROSEN: By de facto being a conspiracy, Your
18 Honor, I believe that we do. The defendants were well aware
19 that other people who came before them, who had done the same
20 cheating scam and had helped successfully get the scam off
21 the ground and perpetuate it and finesse the scam, those
22 parents were well aware of that. That's actually in the
23 criminal complaints, in numerous portions in the calls that
24 were intercepted on the wiretap. So yes, we do have evidence
25 for that.

1 THE COURT: So for purposes of the difference
2 between the sentencing part of this and the guilty part of
3 this, for the guilty part we can say we're holding you guilty
4 for the whole conspiracy. But for the sentencing part I do
5 need to make the breakdown for what the individual defendant
6 did.

7 So, for example, if we were sitting here on a drug
8 conspiracy, you would need to show which part of the drugs
9 that we can say was foreseeable for this particular
10 defendant. Don't you have to do the same here and say which
11 part of whatever loss you're making is foreseeable to this
12 particular defendant?

13 MR. ROSEN: I think no, Your Honor. I think the
14 nub of the whole guidelines is that you have to take each
15 individual case as it comes. And the reason why I set out
16 the fact that this was a large nationwide conspiracy is
17 because it's impossible to break down the costs. Whether as
18 cost that they need to beef up security for the test, cost as
19 to find another test center, cost as to cost paid to the
20 proctors and test administrators, the mailing cost and a
21 bunch of other costs in terms of simply responding to all
22 these inquiries and the internal investigations and the
23 scores and all that stuff.

24 You can't break it down by defendant, but the
25 guidelines don't mandate that you do. All it says is that if

1 you can't reasonably calculate it by defendant, then you look
2 to gain. And gain here is the amount of the bribe.

3 THE COURT: So let's not jump -- let's just do this
4 in pieces.

5 MR. ROSEN: Sure.

6 THE COURT: So piece one is that I need to look --
7 as I read it, I don't need to figure out first who are the
8 victims. I need to figure out first what is the loss.

9 MR. ROSEN: Correct.

10 THE COURT: And then a victim is somebody who has
11 an identified pecuniary loss, correct?

12 MR. ROSEN: That is correct, yeah.

13 THE COURT: So, for example, you could have for
14 loss, conceptually, you can have the difference between an
15 intended or an actual loss.

16 MR. ROSEN: Right.

17 THE COURT: But the victim would only be considered
18 in terms of what that victim suffered, you look at their
19 actual loss. I guess that really gets to the question at the
20 restitution stage rather than here. The loss is the first
21 question. The second question is the victim.

22 MR. ROSEN: You have to attempt to calculate loss,
23 but if you can't reasonably calculate it per each person, the
24 guidelines are clear that you look to gain, Your Honor. We
25 believe that's correct; that it's reasonably foreseeable; and

1 that it's proper. How do you divide up major cost that
2 they've had to essentially revamp exams and security
3 processes amongst 11 defendants plus more in Judge Gorton's
4 case. It's impossible.

5 THE COURT: And I think just from reading the two
6 memos that were filed by defense counsel, I think you got
7 some alarms going that you were going somewhere else in your
8 memo here than you had in your plea agreement. Is it a fair
9 statement then that the government's position is not look at
10 these large numbers of loss that we put in our memo and make
11 something out of that but rather accept that there is some
12 loss, it's indeterminate and that we should look to gain?

13 MR. ROSEN: That's absolutely correct. The only
14 issue, as I said at the beginning, is whether in our belief
15 one penny of gain in this massive nationwide scandal of fraud
16 and corruption counts as loss. And I think it's
17 unequivocally correct. All the different categories we put
18 out -- By the way, you don't have to agree with all the
19 categories. We're giving you have a number of different ones
20 defined.

21 But from all of that information and evidence, and
22 even the statements of the victims themselves, that one penny
23 was lost. Because if so, it's clearly impossible to divide
24 up by person. And as such, under the guidelines you have to
25 go to gain, which in this case was the bribery amount.

1 THE COURT: Your reference to the victim statements
2 just makes me -- I do want to clarify here for the record.
3 The victim statements were submitted, as they tend to be in
4 these things, under seal, confidentially, to the probation
5 office.

6 Is it fair to say, one, that your description of
7 the losses here are based on the government's own analysis
8 rather than anything in the victim impact statement, all your
9 dollar amounts and so forth?

10 MR. ROSEN: Well, yes and no. We've obviously been
11 working on this case for a really long time. We know how the
12 victims had to react, what they had to do, costs that they
13 have incurred.

14 THE COURT: That's my point. It's your analysis of
15 it rather than their -- Again, I think the defendants were
16 wondering was there a piece of paper they didn't get in this
17 process.

18 MR. ROSEN: It's both. And, Judge, all the
19 defendants who have asked for the victim statements have
20 gotten the victim statements. So they have gotten that.
21 It's both. You look at the victim witness statement, for
22 example, from the ACT, they clearly state in there they
23 suffer --

24 THE COURT: Let me just stop you. I'm not sure
25 who's supposed to be keeping this confidential if you're

1 reading it into the record.

2 MR. ROSEN: Okay. I'll stop.

3 THE COURT: For example, you have in your brief an
4 argument that colleges are going to lose money if the number
5 of applicants goes down. And it would surprise me if any
6 college here wants to talk about their application fee as a
7 profit center. I think that would make them pretty
8 uncomfortable, and they would say that covers the cost of
9 reviewing those applications, and it's not a source of
10 revenue. So I don't think that's an argument they would
11 make. It's an argument you're making.

12 MR. ROSEN: That's correct. I think it's based on
13 the studies that we found. It's an accurate argument. You
14 have to look at how applications are processed. It's a fixed
15 cost largely to the universities. They have a certain number
16 of applicants.

17 THE COURT: They're not claiming lost revenue by
18 applications being down.

19 MR. ROSEN: No. It's not them. It's the
20 government's analysis of the facts, yes. Just to get back on
21 that, is that there's a certain number of college admissions
22 officers, they work at the school, and they review whatever
23 applications that come in. They review 50,000, it's the same
24 cost to them, as whether they review 60,000, but they miss
25 out on those 10,000 application payments, which in the case

1 of when the application costs \$85 is significant.

2 So I do think it is reasonable. And I think it's
3 also reasonably foreseeable when you're corrupting an entire
4 admissions system that you would know that the number of
5 applications to a particular university would decrease the
6 following year, which is what the studies that we pointed out
7 show you.

8 THE COURT: Okay. So assuming I accept your
9 argument that there is some loss, that you can't determine
10 the exact loss, and then you're saying you should move to
11 gain. Walk me through the applicable section that would tie
12 that gain to the amount paid by each of the parents here.

13 MR. ROSEN: Again, we have to look at the facts of
14 the case. The facts of the case show that each defendant
15 here pled guilty to conspiracy, an agreement with them and
16 with other people to pay bribes and to obtain property. The
17 gain here is very simple. The gain is the gain from the
18 offense as set forth in the offense conduct.

19 In some cases there was \$250,000 that wasn't part
20 of the offense. It was then paid out in the form of bribes
21 to co-conspirators of the defendants. They're responsible
22 for --

23 THE COURT: Do you have any precedent for -- I
24 understand your argument that it's a conspiracy, and so we
25 can look at what any person in the conspiracy gained. But it

1 seems to me that the guidelines are saying what did this
2 defendant gain. No?

3 MR. ROSEN: I would absolutely disagree, Your
4 Honor, under 2B1.1, it's 3(B), the gain is very clearly
5 stated. "The court shall use the gain that resulted from the
6 offense as an alternative measure of loss." So it's not gain
7 to the defendant personally. It's gain from the entire
8 offense. And so we have to look at what other people that
9 were involved in the offense, the co-conspirators,
10 necessarily gained.

11 THE COURT: If that was correct, if that's the
12 correct analysis, then why isn't it the total money that
13 Mr. Singer made?

14 MR. ROSEN: Well, you have to look at the
15 reasonable foreseeability test. No one is saying that they
16 were reasonably foreseeable for the \$25 million because he
17 didn't tell them about everything. He told them about, for
18 example, if there's -- the bribery at Georgetown, he said
19 other people did it in the past and these people were
20 successful and that type of thing.

21 So you have to -- there's multiple components here.
22 But at the end of the day, the one thing everyone is sure of,
23 the one thing all these defense counsel set forth in the plea
24 agreements, the eminent defense counsel of Boston and
25 elsewhere, is that the foreseeability aspect is equal to the

1 bribe amount. And I think that's accurate. And I think it's
2 the most honest way to do it and the easiest way to calculate
3 it going forward.

4 THE COURT: It may be the easiest, and it may even
5 be the fairest, and we may end up there. But I have to first
6 just make sure what we're doing is comporting with these
7 rules.

8 MR. ROSEN: Correct.

9 THE COURT: And I'm not in doing that saying in any
10 way that you're going to end up there or not there. I just
11 have to get that first step right. You're saying that for
12 the gain, we're going to look at the gain essentially of that
13 part of the enterprise with that transaction.

14 MR. ROSEN: Correct. I have two cases for you,
15 Judge.

16 THE COURT: Yes.

17 MR. ROSEN: The first is *United States v. Offill*,
18 that's O-F-F-I-L-L, and that's 666 F.3d 168. That's the
19 Fourth Circuit 2011. And then I have *United States v. Gordon*
20 at 710 F.3d 1124, and it's from the Tenth Circuit of 2013.
21 And they really just stand for the simple proposition that
22 the defendant is imputed with the gain of the conspiracy so
23 long as that gain was reasonably foreseeable to him.

24 We're not asking for the whole enchilada. We're
25 asking for his particular order or her particular order.

1 THE COURT: What about those defendants who, and
2 it's only a few of them, but who gave money to the university
3 as part of the transaction? Is that money that went to the
4 university part of anybody's gain?

5 MR. ROSEN: Respectfully, Your Honor, I think we're
6 past that now because we've already adjudicated guilt. The
7 parties have already agreed that the --

8 THE COURT: But I need to make the determination.
9 You can argue that --

10 MR. ROSEN: But they've admitted to that.

11 THE COURT: They've admitted to paying that money,
12 and I need to determine the amount of gain. So to say I'm
13 past that doesn't answer the question that I need to decide.

14 MR. ROSEN: Respectfully, Your Honor, what matters
15 is the intent of the person in making the payment, not where
16 it goes. And here they've admitted in this factual
17 stipulation beyond a reasonable doubt that it includes all
18 payments made. The only one really at issue in this case is
19 the Devin Sloane payment because \$50,000 of that went to
20 the -- oh, and Huneus, too, my colleague just reminded me.
21 Just like some of the USC stuff, that is because \$50,000 went
22 to the account controlled by one of the defendants in this
23 case Donna Heinel.

24 It doesn't matter for the testing, and it doesn't
25 matter for Georgetown where all the money went to Rick Singer

1 who then doled it out. The point here is we've already --
2 from an intent point of view from the parent, that issue has
3 already been decided. The parent has admitted to that. I
4 don't think we can go back and say by a preponderance
5 standard that we relitigate that issue.

6 THE COURT: I understand why you're feeling
7 urgently that this is where you have these deals and this is
8 where you got them. I just need to go slowly through these
9 steps. You're saying we have a loss.

10 MR. ROSEN: Correct.

11 THE COURT: We can't differentiate the different
12 parts of the loss.

13 MR. ROSEN: Correct.

14 THE COURT: So as a substitute for that, we're
15 looking at the gain.

16 MR. ROSEN: Correct.

17 THE COURT: And you're saying the gain is the total
18 dollar paid. And my question was if some of that money was
19 paid to a university, as my colleague found in somewhat of a
20 different situation.

21 MR. ROSEN: The government's position, and
22 obviously this will be an issue litigated at trial, for
23 purposes of this hearing, I don't think it is an issue, is
24 that the gain -- It doesn't matter where the money went at
25 the end of the day. You can pay a bribe to anything, any

1 entity or any person.

2 THE COURT: If we were under 4.1 and we were
3 talking about the amount of a bribe. I'm under 1.1, and I'm
4 trying to figure out the amount of a loss, and I'm using a
5 gain as a substitute.

6 MR. ROSEN: If your issue is simply did the school
7 somehow benefit from the \$50,000, or whatever, that was
8 either paid or intended to be paid, the answer is absolutely
9 not. There was no benefit to the school. The schools are
10 trying to dissipate themselves of that money, trying to do it
11 in accordance with the law. They're primarily, at least to
12 the best of my knowledge, working with the California State
13 Attorney General to do that because they are nonprofit
14 institutions.

15 But I don't think it's also correct to say that the
16 school benefited from 50 grand sitting in an account
17 controlled by a co-conspirator here who would then pay it out
18 to curry favor with athletes or coaches in the department.
19 There was no benefit here. The schools have disavowed the
20 money and intend to dissipate it as quickly as they can,
21 according to what I know.

22 THE COURT: Okay. So at this point I don't know
23 whether -- I have a list of defense counsel who wanted to
24 speak. I don't know if my telling you that we don't need to
25 have everyone speak will dissuade anybody, but I have no

1 particular order. If anybody would like to address me at
2 this point? Silence. Okay.

3 I think that fleshes out the arguments unless there
4 is anything else anyone wants to add on that. The only other
5 thing that I have is just a question that came up as I was
6 going through these papers, which I do have a sentencing
7 scheduled starting now on Friday. Am I correct that there
8 has been no specific dollar amount for restitution requested?

9 MR. ROSEN: Right. That's correct. We're still
10 waiting from one of the victims. I think for the purposes of
11 Friday we can be assured that there won't be a restitution
12 request. I don't want to surprise anything with the Court,
13 but I know it's coming up.

14 THE COURT: All right. I don't mean to make it too
15 anticlimactic, but that's what I needed to hear. And I
16 appreciate everyone airing this. And if the probation
17 officer will file that portion of the presentence report so
18 we have the arguments all on the record. Thank you.

19 THE CLERK: Court is in recess. All rise.

20 (Court recessed at 3:18 p.m.)
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25

CERTIFICATION

I certify that the foregoing is a correct
transcript of the record of proceedings in the above-entitled
matter to the best of my skill and ability.

/s/ Joan M. Daly

September 12, 2019

Joan M. Daly, RMR, CRR
Official Court Reporter

Date